No. 86-1342

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

In the Matter of KENNETH P. LA VALLE and LEON J. CAMPO,

Appellants,

—against—

WILLIAM J. CANARY and GEORGE WOLF, as Commissioners of Elections, Suffolk County Board of Elections,

Appellees,

—and—

IRA P. COSTELL,

Intervenor-Appellee.

In the Matter of JAMES J. LACK, JULIETTE A. KINSELLA, CAESAR TRUNZO, OWEN H. JOHNSON, GERALD D'EMILIO, ARMAND ARAUJO, DONALD KITSON, EDWARD U. GREEN, JR., JEFFREY A. BUTZKE, and LEROY E. DEBOARD,

Appellants,

—against—

WILLIAM J. CANARY and GEORGE WOLF, as Commissioners of Elections, Suffolk County Board of Elections,

Appellees,

THOMAS J. DOWNEY and WARREN CROSS,

Intervenors-Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS

(For Appearances See Inside of Cover)

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Question Presented

Does New York Election Law, Section 7-104, afford candidates for certain public offices, who have been cross-endorsed by more than one political party as well as an independent body, freedom of speech and association, and equal protection of law under the United States Constitution, when it provides them access to two rows on the ballot, permits them to be identified on one such row as the candidate of an independent body, and merely withholds from them a third row on the ballot?

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MOTION TO DISMISS

Intervenor-appellee, Robert Abrams, Attorney General of the State of New York, moves to dismiss this appeal on the ground that appellants have failed to present a substantial federal question.

Statement of the Case

Appellants, except for Leon J. Campo, were candidates for various public offices other than Governor or Member of the Assembly. Each was endorsed by two political parties as well as by an independent body, Concerned Citizens Against Lilco, Party ("CCAL"). The candidates' names appeared on two separate rows of the election ballot for the November 4, 1986 General Election as candidates of the Republican and Conservative Parties. The candidates were not afforded a separate and third row for their CCAL candidacy, but that body's name did appear on the ballot with appellants' names in either the Republican or Conservative rows.

Appellant, Leon J. Campo, joined in this action in his capacity as Chairman of the People's Action Coalition, an independent association opposed to the nuclear power plant at Shoreham by the Long Island Lighting Company ("LILCO").

In an effort to have their names appear in a third row on the ballot, as candidates of an independent body, appellants challenged New York Election Law, Section 7-104, on the grounds that it deprived them of their constitutional rights to freedom of speech and association and equal protection of law. In support of this claim, appellants alleged that because they were not given a separate and third row, independent voters were deprived of a means of expressing their opposition to the operation of the Shoreham Nuclear Plant. Appellants also claimed that because New York does not limit the number of rows provided a candidate for Governor or Member of the Assembly, [Section 7-104(6)], they were denied equal protection of the laws.

Appellants appeal to this Court from an order of the New York Court of Appeals, dated December 19, 1986, which dismissed appellants' appeal *sua sponte* upon the ground that "no substantial constitutional question is directly involved."[1] (App. 1)[2]

ARGUMENT

THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

New York Election Law, Section 7-104, is fully consistent with decisions of this Court.[3] It provides that a candidate for public office, other than for the office of Governor or Member of Assembly, who is endorsed by more than one political party, as well as an independent body, shall be limited to two rows on the ballot. The section expressly provides, however, that the independent body's name and emblem shall appear in one of the two rows, as chosen by the candidate.[4] Because appellants clearly had access to the ballot, there is no substantial federal question for review and the appeal should be dismissed.

Appellants contend, nevertheless, that limiting them to two rows on the ballot impinges upon their rights to associate for political purposes, as well as the rights of voters to express their

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[1] The Attorney General of the State of New York intervened below pursuant to N.Y. Exec. Law §71 in support of the constitutionality of the challenged statute (App. 2).

[2] References to pages in the Appendix to the Jurisdictional Statement are indicated as (App. ____).

[3] This case is another in a long line of cases in which the New York courts have upheld Section 7-104 and its predecessor statutes as constitutional. *Matter of Button v. Donohue*, 18 N.Y.2d 792 (1966); *Matter of Battista v. Power*, 16 N.Y.2d 198 (1965); *Matter of Kiley v. Coveney*, 84 A.D.2d 585 (2d Dept. 1981), *aff'd*, 55 N.Y.2d 866 (1982); *Matter of Cherry v. Hayduk*, 49 A.D.2d 934 (2d Dept. 1975).

[4] The candidate designates in writing the row in which he or she wishes the name and emblem of the independent body to appear. Section 7-104(5)(c).

views effectively. It has consistently been held, however, that these associational rights are not absolute and "are necessarily subject to qualification if elections are to be run fairly and effectively." *Storer v. Brown*, 415 U.S. 724, 730 (1974), *cited in Munro v. Socialist Workers Party*, 107 S. Ct. 533, 536 (1986).

To determine whether a statute of this nature infringes upon constitutional rights:

> "[A] court ... must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by the rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of these interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights."

Tashjian v. Republican Party, 107 S. Ct. 544, 548 (1986) (*quoting Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

Section 7-104 does not bar a candidate's access to the ballot, and does not infringe upon his right to associate for the advancement of common political objectives. First, the candidate's name appears in two separate rows on the ballot, and anyone wishing to vote for the candidate may thus do so. Second, the name of the independent body endorsing him and its emblem appear on the ballot in one of the two rows as designated by the candidate. Thus, neither the candidate nor the independent body is denied access to the ballot, and the candidate's association with the independent body is clearly established. Accordingly, the section does not injure appellants' first or fourteenth amendment rights.

The State's interest in limiting the number of rows permitted is twofold: (1) to prevent the major parties from preempting the ballot through the device of setting up independent

political bodies, *Battista v. Power*, 16 N.Y.2d at 201; and (2) to prevent voter confusion and ballot overcrowding by single issue independent bodies. Voter confusion and ballot overcrowding have been upheld as reasonable predicates for qualifying access to the ballot. *Munro v. Socialist Workers Party*, 107 S. Ct. at 538; *Storer v. Brown*, 415 U.S. at 736. A state is not required to prove actual voter confusion, ballot overcrowding or the presence of frivolous candidates as a predicate to imposing reasonable ballot access restrictions. *Munro v. Socialist Workers Party*, 107 S. Ct. at 537. To require such proof "would invariably lead to endless court battles over the sufficiency of the 'evidence' marshalled by the state to prove the predicate." 107 S. Ct. at 538.

> "Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Id.*

Tashjian v. Republican Party, 107 S. Ct. 544, is not to the contrary. There, the Court, in striking down a statute which required voters in a political party primary to be registered members of that party, held that voter confusion was insufficient reason to restrict ballot access. However, the Court distinguished its holding from cases which have upheld the state's right to protect the integrity and reliability of the electoral process. The statute in *Tashjian* resulted in a "closed" primary *totally* barring nonmembers of the Party from voting in the primary, as distinguished from the statute challenged here which bars no one from voting for the candidate of his choice, and bars no candidate from the ballot.

Other decisions of this Court relied upon by appellants are equally inapposite. Those decisions involved state statutes that imposed more burdensome requirements on new political parties or independent groups than on established political parties and thereby limited their access to the ballot. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983) (Court invalidated Ohio early filing deadline applicable only to independent candidates for

President); *Illinois State Board of Election v. Socialist Workers*, 440 U.S. 173 (1979) (Court declared unconstitutional geographic classification which required more signatures for independent candidates seeking office in Chicago than for such candidates seeking state-wide office); *Williams v. Rhodes*, 393 U.S. 23 (1968) (Court invalidated Ohio early filing deadline and signature requirements applicable only to new political parties). In contrast, the pertinent subsections of 7-104 do not bar an independent body's access to the ballot, and do not prevent an independent body from placing their candidate before the electorate.

Appellant's argument with respect to equal protection must also fail. Equal protection requires only that persons similarly circumstanced be treated alike. *Plyler v. Doe*, 457 U.S. 202 (1982). Here, all candidates for the same office are limited by the same restrictions. Appellants were not running against candidates for the office of Governor or Member of the Assembly. Appellants implicit assumption that states must conduct elections for all offices in identical fashion is entirely unfounded. The "Equal Protection Clause does not require that a State ... choose between attacking every aspect of a problem or not attacking the problem at all" (citation omitted). *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

In any event, treatment of minority parties which does not exclude them from the ballot, prevent them from obtaining major party status, or prevent any voter from voting for the candidate of his choice, and which reasonably achieves important state objectives, does not violate the equal protection clause. *Board of Election Commissioners v. Libertarian Party*, 591 F.2d 22 (7th Cir.), *cert. denied*, 442 U.S. 918 (1979). Here, the State's objective, to preserve the integrity and reliability of the electoral process, is a constitutionally permissible predicate for qualifying access to the ballot, *Munro v. Socialist Workers Party*, 107 S. Ct. 533, and thus Section 7-104 does not violate the equal protection clause of the United States Constitution.

CONCLUSION

As appellants have failed to raise a substantial federal question, this Court should dismiss the appeal.

Dated: New York, New York
April 13, 1987

Respectfully submitted,
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